

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of HAROLD and
SYLVIA STONIER.

HAROLD STONIER,

Appellant,

v.

SYLVIA STONIER,

Respondent.

D055547

(Super. Ct. No. DN81873)

APPEAL from an order of the Superior Court of San Diego County, Sim von
Kalinowski, Judge. Affirmed.

I.

INTRODUCTION

Harold Stonier (Harold) appeals from a trial court's order that he pay \$15,523.56 in unpaid child support to his former wife, Sylvia Stonier (Sylvia). Harold contends the trial court erred in setting the child support arrears. Specifically, Harold maintains that

the court should have retroactively modified his child support obligations in light of his incarceration, which began in 2003. We conclude that Harold failed to properly raise his request to modify his child support obligations in the trial court, and that he may not do so for the first time on appeal. Harold also contends that the trial court violated his constitutional rights by denying him access to the court. We conclude that the trial court did not deny Harold access to the court. We therefore affirm the trial court's order.¹

II.

FACTUAL AND PROCEDURAL BACKGROUND

On or about October 10, 2007, Harold, acting in pro. per., attempted to file a motion entitled "Plaintiff's Motion to Recalculate Child Support."² The primary focus of Harold's motion was his contention that Sylvia's attorney had failed to list one of Harold and Sylvia's three children on a 2004 notice to withhold income from Harold's military pension. In his motion, Harold expressed his concern that this error might cause a court to conclude that he had failed to pay child support. Harold also stated, "Plaintiff is currently a federal inmate and his financial situation has changed (military retirement pay is intact [unaffected]) warranting recalculation of the level of financial Child Support."

¹ Sylvia has not filed a respondent's brief. Accordingly, we decide the appeal based on the record, Harold's opening brief, and Harold's telephonic oral argument. (See Cal. Rules of Court, rule 8.220(a)(2).)

² Harold's motion is dated October 10, 2007. The clerk of court received the motion on November 2, 2007. The child support order that Harold was attempting to modify is not contained in the record on appeal.

The trial court clerk refused to file this motion. The rejection notice states, "The Petitioner's motion to recalculate child support cannot be filed in the manner submitted. The court records indicate the petitioner is represented by [counsel]. There are required forms to file for modification. Please speak with your attorney before proceeding."

In a letter dated December 14, 2007, and filed July 21, 2008, Harold requested that the court file an ex parte motion to proceed pro se, and a document entitled "Motion to Recalculate Child Support." A clerk's certificate in the record indicates that the trial court received Harold's "Motion to Recalculate Child Support" in November 2007. However, the clerk's certificate also states, "There is nothing in the file to indicate "[Harold's] Motion to Recalculate Child Support was resubmitted."

In June 2008, Sylvia filed an application to modify an earnings assignment order.³ In her application, Sylvia sought to correct the error that Harold had referenced in his October 10, 2007 motion, namely, the failure to include one of Sylvia and Harold's three children on a 2004 notice to withhold income from Harold's military pension.

On July 15, 2008, Harold filed a response to Sylvia's ex parte application to modify an earnings assignment order for support.⁴ In his response, Harold objected to Sylvia's modification request, arguing, "[Harold] has no ongoing obligation to make good

³ "The Family Code authorizes the obligee of a family support order to obtain an 'earnings assignment order for support' . . . which may be served on the holder of 'earnings', e.g., wages or other payments due the obligor as a result of an enforceable obligation." (*In re Marriage of Johnson-Wilkes & Wilkes* (1996) 48 Cal.App.4th 1569, 1571; see Fam. Code, § 5208.)

⁴ The document is dated July 9, 2008.

on what amounts to [Sylvia's] unrealized gain." Harold explained that he had been arrested in April 2003 and was thereafter sentenced to 10 years in prison. Harold claimed that after his arrest, he "did not move to modify the amount of child support for the express purpose of gratuitously overpaying his child support" In other words, Harold claimed that he had intentionally overpaid child support subsequent to his incarceration. Nevertheless, Harold claimed that the "court should [now] retroactively adjust [Harold's] level of financial child support to April 2003." On August 22, 2008, the trial court granted Sylvia's application to modify the earnings assignment order. The court did not modify Harold's child support obligations.

On May 26, 2009, Sylvia filed an application for an order to determine child support arrears. Sylvia supported her application with a declaration in which she set out the amounts of child support that she claimed Harold owed and the amounts Harold had allegedly paid, on a monthly basis, from 2005 through 2008. Sylvia claimed that Harold owed her \$20,658.04 in unpaid child support.

On July 6, 2009, the trial court held a hearing at which Sylvia was present, and Harold was not present.⁵ That same day, the trial court entered an order finding that Harold owed Sylvia \$15,523.56 in child support arrears. The court's order does not indicate the method by which the court calculated the amount of child support owed, and the record does not include a transcript of the hearing.

⁵ The record does not include a transcript of the hearing.

On July 7, 2009, the day after the trial court ruled on Sylvia's application for an order determining child support arrears, Harold filed a response to Sylvia's application. In his response, Harold claimed that the trial court should retroactively reduce his child support obligations, and find that Harold was owed \$22,994.89 based on his overpayment of child support in the years following his 2003 incarceration.

Harold appeals from the trial court's July 6 order.

III.

DISCUSSION

- A. *Harold did not adequately raise his request to modify his support obligations in the trial court, and he may not seek such a modification for the first time on appeal*

Harold claims that the trial court erred in entering an order concluding that he owes \$15,523.56 in child support arrears. Harold contends that the trial court should have retroactively modified his child support obligations in light of his ongoing incarceration, which began in 2003. Harold failed to properly raise this request in the trial court, and he may not do so for the first time on appeal.

1. *Harold did not file a proper motion to modify his child support obligations in the trial court*

Harold claims that he filed motions to modify his child support obligations on October 10, 2007, December 14, 2007, and July 10, 2008.⁶ Harold also claims that the trial court erred in failing to consider his response to Sylvia's application for an order

⁶ Specifically, Harold claims that he "filed to have his . . . child support recalculated . . . on [October 10, 2007], and again on [December 14, 2007], and again on [July 10, 2008]. . . ."

determining child support arrears, in which he requested that the court retroactively modify his child support obligations in light of his incarceration. We explain below why none of these documents constituted a proper motion to modify Harold's child support obligations.

a. *The October 10, 2007 motion*

In the October 10, 2007 "Motion to Recalculate Child Support," Harold did not seek a reduction of his child support obligations retroactive to his April 2003 incarceration. Rather, Harold's October 10, 2007 motion was devoted almost entirely to correcting an error in the withholding of child support payments from Harold's military pension that would *increase* the amount of child support payments that Harold was making to Sylvia.⁷ While Harold did include one sentence in his motion that indicated that his income had decreased as a result of his incarceration, he did not state the amount by which his income had been reduced, nor did he specify the manner by which he wanted to decrease the child support award. Further, Harold did not attach an income and expense declaration or a simplified financial statement to his motion, as required. (See Cal. Rules of Court, rule 5.118(b) ["A completed *Income and Expense Declaration* (form FL-150) or *Financial Statement (Simplified)* (form FL-155), *Property Declaration* (form FL-160), and *Application for Order and Supporting Declaration* (form FL-310) must be attached to an application for an injunctive or other order when relevant to the

⁷ Harold acknowledged the fact that his October 2007 motion was not directed at reducing his child support in his July 2008 response to Sylvia's application to modify an earnings assignment order. In that response, Harold stated that he "filed a pro se motion with this court on [October 10, 2007], to *increase* his child support." (Italics added.)

relief requested"].) In light of Harold's failure to include the basic required documentation pertaining to his alleged reduced income, the trial court clerk did not err in rejecting Harold's October 10, 2007 motion.

b. *Harold's letter to the clerk dated December 14, 2007*

The record indicates that Harold sent a letter to the trial court clerk dated December 14, 2007 in which he requested that the trial court clerk file his "Motion to Recalculate Child Support." However, the record does not indicate that Harold resubmitted his October 10, 2007 motion with the letter. Further, to the extent that Harold may have resubmitted the October 2007 motion, the motion was defective for the reasons stated in the previous paragraph, and there is nothing in the record indicating that he corrected those deficiencies in December 2007.

c. *Harold's July 2008 response to Sylvia's application to modify an earnings assignment order*

In July 2008, Harold filed a response to Sylvia's application to modify an earnings assignment order in which he requested that the court retroactively modify his child support obligations. The trial court did not err in declining to modify Harold's child support obligations based on Harold's response to Sylvia's application. As a threshold matter, it was not proper for Harold to seek to modify his child support obligations by way of a response to an application to modify an earnings assignment order. (See Fam. Code, § 213, subd. (a) ["In a hearing on an order to show cause, or on a modification thereof, or in a hearing on a motion, other than for contempt, the responding party may seek affirmative relief alternative to that requested by the moving party, *on the same*

issues raised by the moving party, by filing a responsive declaration within the time set by statute or rules of court," italics added.) In any event, Harold did not include any of the supporting documentation required by California Rules of Court, rule 5.118(b) to seek a modification of a child support award.

d. *Harold's response to Sylvia's application to determine child support arrears was untimely*

Harold's response to Sylvia's May 26, 2009 application to determine child support arrears was filed on July 7, 2009, one day *after* the trial court entered its order on Sylvia's application.

Citing the inmate mailbox rule, Harold claims that the court should have considered his response to have been constructively filed on June 27, 2009, the date on which Harold states on the response that he executed the document. In *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 129, the California Supreme Court held that "a notice of appeal by a self-represented prisoner in a civil case is deemed filed as of the date the prisoner properly submits the notice to prison authorities for forwarding to the superior court." Assuming that this doctrine applies to a response to an application in a family law proceeding, Harold has not established the date on which he submitted his response to prison authorities for forwarding to the trial court.

Even assuming that Harold did forward his response to prison authorities on June 27, he still has not established that the court erred in refusing to consider the document. Harold maintains that the trial court "later communicated that it did not have to consider his input because there was a rule that said his input must be received 10-days before the

hearing." We assume for purposes of this opinion that the trial court made a statement to this effect.⁸ Harold does not claim that the trial court erred in allegedly indicating that he was required to file his response 10 days prior to the July 6 hearing, which would have been on June 26, 2009.⁹ Nor does Harold dispute that the earliest date on which his response could be deemed to have been filed is June 27, 2009, the date that appears on the response. Rather, Harold's sole claim as to timeliness is that the trial court "rush[ed] the issue to a hearing 9 days after his [constructive] responsive-reply filing [on June 27]." We are not persuaded. The trial court did not engage in any improper "rushing" of Sylvia's application. Sylvia filed her initial order to show cause on May 26, 2009. The May 29 order to show cause stated the hearing date — July 6, 2009. Thus, the July 6 hearing date was set long before Harold's June 27 constructive filing.

Accordingly, we conclude that the trial court did not err in failing to consider Harold's response to Sylvia's application for child support arrears, in which he requested that the court retroactively modify his child support obligations in light of his incarceration, which began in 2003.

⁸ There is nothing in the record that supports Harold's assertion.

⁹ Harold does not cite the 10-day rule to which the trial court allegedly made reference, and it is unclear on which rule the court purportedly based its comment. Generally speaking, "All responsive papers [in family law proceedings] must be served and filed no later than *nine court days* before the hearing unless the court prescribes a shorter time." (Hogoboom and King, Cal. Practice Guide: Family Law (The Rutter Group 2009) ¶ 5:386; Code Civ. Proc. 1005, subd. (b).) June 27, 2009, a Saturday, was only *four* court days prior to the July 6, 2009 hearing. Harold's reply was thus not timely under this rule, either.

2. *Harold may not seek to modify his child support obligations for the first time on appeal*

Citing federal case law, Harold claims that "issues may be heard for the first-time on appeal where plain error has occurred and injustice might otherwise result." We are aware of no California case law holding that a party may seek to modify his or her child support obligations for the first time on appeal. In any event, even if there were such authority, Harold would not be entitled to prevail in this appeal. The initial child support order that Harold seeks to modify is not in the record.¹⁰ In addition, Harold has not filed an income and expense declaration or a simplified financial statement, as is required. (Cal. Rules of Court, rule 5.118(b).) Further, Harold would not be entitled to a modification of his child support obligations retroactive to the date of his incarceration in 2003. California law is clear that a court may not retroactively modify a party's child support obligations to a date prior to the date on which that the party filed the motion seeking modification. (See Fam. Code, § 3653, subd. (a) ["An order modifying or terminating a support order may be made retroactive to the date of the filing of the notice of motion or order to show cause to modify or terminate, or to any subsequent date"]; *In re Marriage of Everett* (1990) 220 Cal.App.3d 846, 852 ["The law allows retroactive

¹⁰ Harold claims that the trial court entered an order in April 1997 directing him to pay \$1,294 a month to Sylvia as child support for their three children. Sylvia stated in her declaration in support of her application to determine child support arrears that the court ordered Harold to pay \$1,244.88 a month in child support from January 2005 through April 2005, and that the court ordered Harold to pay \$862.66 a month in child support from May 2005 through December 2008. Neither the initial child support order, nor any modification thereof, appears in the record.

modification of any order modifying or revoking a support order, but only to the date of filing the notice of motion or order to show cause].)

Accordingly, we conclude that Harold is not entitled to reversal of the trial court's order determining child support arrears on the ground that Harold is entitled to a retroactive modification of his child support obligations.

B. *The trial court did not deny Harold access to the court*

Harold claims that the trial court violated his constitutional rights by denying him access to the court. He advances three arguments in support of this claim. None is persuasive.

1. *The trial court did not fail to consider Harold's motions*

Harold claims that the trial court improperly failed to rule on various motions to recalculate child support that Harold purportedly filed prior to Sylvia's May 2009 application to determine child support arrears. Harold did not file a proper motion to modify his child support obligations on any occasion prior to Sylvia's May 2009 application to determine child support arrears. (See pt. III.A.1., *ante*.) Thus, the trial court did not err in failing to rule on Harold's motions.

2. *The trial court did not deny Harold telephonic access to court hearings*

Harold also suggests that the trial court prevented him from making a telephonic appearance at the hearing on Sylvia's application to determine child support arrearages. There is nothing in the record to suggest that Harold requested that the trial court allow

him to appear telephonically at the July 6, 2009 hearing.¹¹ (Compare with *Jameson v. Desta* (2009) 179 Cal.App.4th 672, 675 [trial court erred in dismissing action on ground the prisoner had failed to appear telephonically where prisoner had filed request to appear telephonically and "notified the trial court on numerous occasions that prison personnel were not allowing him to communicate telephonically with the court"]; *Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468, 1484-1485 ["When hearings were scheduled, appellant not only provided notice to opposing counsel when required to do so, he repeatedly requested court orders to permit him to appear telephonically from prison"].) Harold cites no case law, and we are aware of none, that required the trial court to "arrange for [Harold] to make [a telephonic] appearance," in the absence of a request on Harold's part to be allowed to appear.

3. *The trial court did not improperly fail to consider Harold's response to Sylvia's application for child support arrears*

Finally, Harold contends that the trial court erred in failing to consider his response to Sylvia's application for child support arrears in which he requested a "retroactive equitable adjustment of Plaintiff's financial child support." Harold's response was untimely. (See pt. III.A.1.d., *ante*.) The trial court thus did not err in failing to consider Harold's response.

¹¹ The record does contain a motion dated July 14, 2009 — eight days *after* the July 6 hearing — in which Harold requested "an ongoing teleconference appearance."

IV.

DISPOSITION

The July 6, 2009 order is affirmed. Harold is to bear costs on appeal.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.